Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Appropriate Framework for Broadband	)	
Access to the Internet over Wireline Facilities	)	CC Docket No. 02-33
	)	
Universal Service Obligations of Broadband	)	
Providers	)	
	)	
Computer III Further Remand Proceedings:	)	CC Docket Nos. 95-20, 98-10
Bell Operating Company Provision of	)	
Enhanced Services; 1998 Biennial Regulatory	)	
Review – Review of Computer III and ONA	)	
Safeguards	)	

JOINT COMMENTS OF KMC TELECOM AND NUVOX COMMUNICATIONS

Jonathan E. Canis
David A. Konuch
Randall W. Sifers
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W.
Suite 500
Washington, D.C. 20036
(202) 955-9600

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SUMMARY

KMC Telecom, Inc. and NuVox Communications, Inc. urge the Federal Communications Commission *not* to adopt its tentative conclusion that wireline broadband Internet access services are information services subject to regulation under Title I of the Communications Act of 1934, as amended ("the Act").[1] This Commission should reject its tentative conclusion and reaffirm its prior conclusion that advanced services, such as xDSL-based access to the Internet, are telecommunications services subject to regulation under Title II of the Act.

The Commission's tentative conclusion contains three basic, fatal flaws: first, it is an unexplained and unexplainable departure from the Commission's well-reasoned, prior precedent holding that xDSL-based access to the Internet *is* a telecommunications service; second, the tentative conclusion threatens to withdraw all Incumbent Local Exchange Carrier ("ILEC")-provided services from Title II regulation in violation of the Act; and third, in addition to being illegal if adopted, the Commission's tentative conclusion simply represents bad public policy as it threatens to embroil the Commission in the regulation of the Internet and to expose consumers and the ILECs' carrier-customers to the ILECs' unrestrained market power.

The *Notice's* tentative conclusion that wireline broadband Internet access is an "information service" contradicts recent Commission rulings interpreting the Act and is highly unwise from a policy standpoint. Moreover, any interpretation of the Act that suggests, as the Commission does in the *Notice*, that ILECs can configure their service offerings in a way that enables them to evade the Act's core obligations, such as its unbundling provisions under Sections 251 and 252, cannot be viewed as reasonable, and must be rejected. Carriers such as

[1] 47 U.S.C. §§ 151 *et seq.*

KMC and NuVox face significant obstacles in obtaining from the ILECs the inputs they need to provide service even under the Commission's current regulatory regime. Instead of questioning the applicability of core Title II safeguards to advanced services, the very act of which creates regulatory uncertainty that is harmful to competitive carriers, the Commission should be considering ways to strengthen and better enforce its current rules.

It also appears that the ILECs may seek to use this proceeding obtain the relief sought in the Tauzin-Dingell legislation currently stalled in Congress. The Commission must not permit the ILECs to use this proceeding to circumvent the legislative process.

Today, competition that could challenge the ILECs' dominance is beginning to take root, but remains fragile. Now is not the time for the Commission to "pick winners and losers" by gifting the ILECs with the undeserved windfall of premature deregulation. The Commission's regulations implementing the will of Congress are the main reason that competition exists today. The Joint Commenters strongly urge the Commission to reaffirm its prior conclusion that broadband access to the Internet is a telecommunications service, and that ILECs shall remain subject to the Act's core unbundling provisions until fully implemented, as required by law.

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JOINT COMMENTS OF
KMC TELECOM AND NUVOX COMMUNICATIONS

KMC Telecom, Inc. and NuVox Communications (collectively, "the Joint Commenters"), through their attorneys, hereby file these comments in response to the Commission's *Notice of Proposed Rulemaking*[2] urging the Commission *not* to adopt its tentative conclusion that wireline broadband Internet access services are information services subject to regulation under Title I of the Communications Act of 1934, as amended ("the Act").[3] This Commission should reject its tentative conclusion and reaffirm its prior conclusion that advanced services, such as xDSL-based access to the Internet, are telecommunications services subject to regulation under Title II of the Act.

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2 *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket No. 02-33, Universal Service Obligations of Broadband Providers, Computer III Further Remand Proceedings*: *Bell Operating Company Provision of Enhanced Services, 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements, CC Dockets Nos. 95-20, 98-10*, Notice of Proposed Rulemaking, FCC 02-42 (rel. Feb. 15, 2002) (*Notice*).

3 47 U.S.C. §§ 151 *et seq.*

I. INTRODUCTION

The Commission's tentative conclusion contains three basic, fatal flaws: first, it is an unexplained and unexplainable departure from the Commission's well-reasoned, prior precedent holding that xDSL-based access to the Internet *is* a telecommunications service; second, the tentative conclusion threatens to withdraw all ILEC-provided services from Title II regulation in violation of the Act; and third, in addition to being illegal if adopted, the Commission's tentative conclusion simply represents bad public policy as it threatens to embroil the Commission in the regulation of the Internet and to expose consumers and the ILECs' carrier-customers to the ILECs' unrestrained market power.

Today, competition that could challenge the ILECs' dominance is beginning to take root, but remains fragile. Now is not the time for the Commission to "pick winners and losers" by gifting the ILECs with the undeserved windfall of premature deregulation. The Commission's regulations implementing the will of Congress are the main reason that competition exists today. The Joint Commenters strongly urge the Commission to reaffirm its prior conclusion that broadband access to the Internet is a telecommunications service, and that ILECs shall remain subject to the Act's core unbundling provisions until fully implemented, as required by law.

II. OVERVIEW OF THE JOINT COMMENTERS

Each of the Joint Commenters is a facilities-based broadband provider. The following is a brief overview of the Joint Commenters' businesses:

- **KMC Telecom.** KMC is a facilities-based integrated communications provider offering voice and broadband data services over nearly 3 million lines to more than 14,000 small/medium/large business and public/private institutional end users. KMC's lines and customers are predominantly in 35 tier-three markets in 17 states east of the Rocky Mountains. KMC also has deployed a national broadband data platform providing carrier customers with advanced local and Internet access in 140 markets throughout the United

States. In its 37 core local markets, KMC uses digital circuit switching and advanced soft-switch equipment, as well as its high-speed, high-capacity SONET fiber ring networks and transmission equipment deployed in 140 ILEC end offices to provide a suite of services never before provided to customers in tier-three markets.

- **NuVox.** NuVox is a rapidly growing, facilities-based integrated communications provider. NuVox emerged from the union of two regional CLECs, Gabriel and TriVergent. Using its own digital and packet switching equipment, and collocated transmission equipment in 205 collocations, NuVox serves 30 predominantly tier-two and tier-three markets in 13 states across the Midwest and Southeast. NuVox packages dedicated high-speed Internet access, web design and hosting, and "traditional" local and long distance telephone services with unified voice, e-mail, and fax messaging as well as advanced data services. NuVox also provides dial-up Internet services, data center services, and Customer Premise Equipment interconnects. NuVox provides its "broadband bundle" of services to most of its customers over an integrated T1.

The Joint Commenters provide living proof that the Act can work to bring competition to consumers. They have not given up on Congress's dream of a competitive telecommunications market. Neither should this Commission.

III. THE COMMISSION ALREADY HAS HELD THAT WIRELINE BROADBAND INTERNET ACCESS PROVIDED OVER xDSL IS A TITLE II SERVICE; MOREOVER, THIS FINDING HAS ALREADY BEEN UPHELD BY THE DC CIRCUIT

In the *Notice*, the Commission claims that it has not "explicitly address[ed] the regulatory classification of wireline broadband Internet access services."[4] Footnote 1 of the *Notice* makes clear that by "wireline broadband Internet access," the Commission is referring to xDSL-based access to the Internet.[5] The Commission in the *Notice* then tentatively concludes that "wireline broadband Internet access services – whether provided over a third party's facilities or self-provisioned facilities – are information services subject to regulation under Title I of the Act," and seeks comment on this tentative conclusion.[6]

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4 *Notice* at para. 14.

5 *Notice*, n.1.

6 *Notice* at para.16.

Contrary to the Commission's statement in the *Notice*, the issue of whether wireline broadband Internet access, *i.e.*, xDSL-based access to the Internet, is a Title II service is *not* a case of first impression. Rather, the FCC has already held – *at least twice* – that it is a Title II service. The FCC explicitly addressed this question in prior proceedings, and it reached a conclusion diametrically opposed to the "tentative" conclusion the FCC proposes to adopt here. Moreover, the FCC's prior finding was *upheld* by the Court of Appeals for the DC Circuit in *WorldCom v. FCC*.[7]

The Commission claims that it left open this issue in its *Report to Congress*[8] in 1998.[9] In fact, the issue reserved in the *Report to Congress*, whether ISPs that self-provision their own telecommunications facilities should be required to contribute to the universal service fund, is much narrower than that raised here. The core questions as to the treatment of advanced services – wireline broadband access to the Internet – that the *Report to Congress* left unanswered were addressed in the *Advanced Services* orders.[10] No record evidence exists that could justify overturning these findings. For the Commission to pretend this contrary precedent does not exist would be the height of arbitrary and capricious action.

A. The FCC Already Has Ruled that Transmission Used To Provide xDSL Is A Telecommunications Service

Contrary to the suggestion in the *Notice* that this is a case of first impression, the Commission in fact already has expressly dealt with the issue of whether wireline broadband

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7 246 F.3d 690 (D.C. Cir. 2001).

8 *See Federal-State Joint Board on Universal Service*, *Report to Congress*, 13 FCC Rcd 11501 (1998) ("*Report to Congress*").

9 *Notice* at para.14.

10 *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Remand, 15 FCC Rcd 385 (1999) ("*Advanced Services Remand Order*"); Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24011 (1998) ("*Advanced Services MO&O and NPRM*").

Internet access is a telecommunications service. The holdings in these orders were adopted by a unanimous Commission that included the current Chairman.[11] While the *Notice* attempts to distance itself from these prior holdings, the language of the prior orders excerpted below make crystal clear that the issue the Commission considered in those proceedings – the proper regulatory treatment of xDSL – is identical to the one at issue in this *Notice*.

For example, in the *Advanced Services MO&O and NPRM*, the Commission stated flat out that it intended to consider the proper regulatory classification of wireline "advanced services," known then, and now, as broadband:

> [W]e first must address the regulatory classification of "advanced services." . . . In particular, we consider whether advanced services constitute "telecommunications services," and, if so, what type of telecommunications service.[12]

The Commission defined "advanced services" as "high speed, switched, broadband, wireline telecommunications capability that enables users to originate and receive high-quality voice, data, graphics and video telecommunications."[13]

What was at issue in that proceeding was the proper regulatory treatment of wireline broadband. In that proceeding, the Commission left no doubt as to the proper regulatory classification of wireline broadband. As the quote below indicates, the Commission then concluded – *without qualification* – that wireline broadband is a Title II telecommunications service:

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11 In the *Advanced Services MO&O and NPRM*, there were no dissents; in the *Advanced Services Remand Order*, then-Commissioner Furchtgott-Roth dissented from the portion of the order finding DSL was either exchange access or local exchange service, but supported the rest of the order.

12 *Advanced Services MO&O and NPRM*, 13 FCC Rcd at 24028, para. 33 (1998).

13 *WorldCom v. FCC*, 246 F. 3d 690 at n.1.

> ***We conclude that advanced services*** [*i.e.*, high speed, switched, broadband, wireline telecommunications capability] ***are telecommunications services.***[14]

The Commission also made clear that, in contrast to the view proposed in the *Notice*, that the transmission element is separate from any information services element of wireline broadband service, and that the fact that an information services component is bundled with the telecommunications service does not convert the Title II "telecommunications service" into a Title I "information service":

> The Commission has repeatedly held that specific packet-switched services are "basic services," that is to say, pure transmission services. xDSL and packet switching are simply transmission technologies. *To the extent that an advanced service does no more than transport information of the user's choosing between or among user-specified points, without change in the form or content of the information as sent and received, it is "telecommunications," as defined by the Act.* Moreover, *to the extent that such a service is offered for a fee directly to the public, it is a "telecommunications service."*[15]

This finding was so clear and obvious to all who participated in that proceeding that no one, not even the ILECs, disagreed with it:

> Incumbent LECs have proposed, and are currently offering, a variety of services in which they use xDSL technology and packet switching to provide members of the public with a transparent, unenhanced, transmission path. ***Neither the petitioners, nor any commenter, disagree with our conclusion that a carrier offering such a service is offering a 'telecommunications service'.***[16]

In fact, Qwest's predecessor, US WEST, the company that originally filed the petition seeking relief from regulation, *expressly conceded* that xDSL-based advanced services –

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14 *Advanced Services MO&O and NPRM*, 13 FCC Rcd at 24029-30, para. 35 (1998) (emphasis added).

15 *Id.* at 24029-30, para. 35 (emphasis added).

16 *Id.* at 24030, para. 36 (emphasis added).

which the *Notice* refers to as wireline broadband – were a Title II "telecommunications service."

As the Commission stated:

> [W]e affirm our prior conclusion that xDSL-based advanced services constitute telecommunications services as defined by section 3(46) of the Act. . . . . [E]ven US WEST [the carrier that filed the petition for clarification leading to this order] has expressly conceded that advanced services fall within the broad ambit of telecommunications services.[17]

Nor does it change the Commission's analysis if the broadband capability is used to provide Internet access. As that Commission stated:

> ***An end-user may utilize a telecommunications service together with an information service, as in the case of Internet access. In such a case, however, we treat the two services separately: the first service is a telecommunications service (e.g., the xDSL-enabled transmission path), and the second service is an information service, in this case Internet access.***[18]

The Commission also outlined the firm policy basis that supports its decision that x-DSL-based services are "telecommunications services": to do otherwise would be at odds with Congress's intent to create competition in telecommunications markets. As the Commission stated:

> [N]either US WEST, SBC, nor any other party has explained how exempting xDSL-based advanced services from section 251(c) would further the purposes of this section or the 1996 Act. ***We find no evidence that Congress intended to eliminate the Commission's authority to require access to network elements used to provide advanced services – a result which is at odds with the technology neutral goals of the Act and with Congress' aim to encourage competition in all telecommunications markets.*** [19]

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17 *Advanced Services Remand Order*, 15 FCC Rcd at 388-89, para. 9 (emphasis supplied).

18 *Advanced Services MO&O and NPRM*, 13 FCC Rcd at 24030, para. 36 (emphasis added).

19 *Advanced Services Remand Order*, 15 FCC Rcd at 390, para. 12 (emphasis added).

Having articulated this important policy ground as its basis for finding that wireline broadband Internet access is a "telecommunications service," the current Commission would be hard pressed to convince a court that it is free to adopt a policy conclusion that would directly undermine this rationale, and contradict what the Commission found very recently to be Congress's intent.

The short life of the Act has been marked by almost continuous litigation. The industry lost valuable time when rules crafted in 1996 at an expedited pace were appealed and struck down by an appellate court only to be reinstated by the Supreme Court. At present, in part because of the Supreme Court's ruling and the Commission's response to it, the current rules are perhaps as clear as they have been at any time since 1996 when the Act became law, although the Commission's pending *Triennial Review* proceeding[20] threatens this clarity. Competitors built their businesses based on the rules that the Commission promulgated. Yet, the *Notice* proposes a future where the current rules, crafted through years of painstaking and expensive litigation, are discarded before even given a chance to succeed. Such an approach, if followed, all but guarantees years of continued litigation. The Joint Commenters believe that the time for litigating has passed. Now is the time for the Commission to let the competitors compete. The Commission should avoid adopting tentative conclusions that are guaranteed to bring extensive litigation.

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[20] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147*, Notice of Proposed Rulemaking, FCC 01-361 (rel. Dec. 20, 2001) ("*Triennial Review*").

B. A Dominant Carrier Cannot Evade Regulation of Title II Services Merely By Bundling Them With An Information Storage Capability

In the *Notice*, the Commission suggests that to the extent that a provider of advanced services offers end users the capability to store files on the service provider's computers to establish a home page on the web the provider is offering more than pure transmission service.[21] The Commission reasons that under this factual situation the transmission component is embedded within, and not separate and distinct, from the information service. Rather than finding that wireline Internet access service consists of two separate services, it tentatively concludes that under this scenario it is an information service. However, the Commission has rejected such analysis before, based on the carrier's monopoly control over bottleneck facilities. For example, the ILECs tried this ploy before as a means of evading regulation, and the Commission wisely rejected it. If the *Notice's* suggestions were true, a dominant telephone company could avoid all regulation of its POTS service merely by bundling that service with voicemail, a practice the Commission already has rejected.[22] Claiming that advanced services can now be offered by dominant carriers completely free of regulation merely through the artifice of bundling this service with the ability to store information on a home page would be just as offensive, and any reviewing court is likely to view such an argument with extreme skepticism. As demonstrated above, the Commission already has set forth the proper regulatory treatment of wireline broadband Internet access: that advanced services are "telecommunications services," subject to regulation under Title II.

Proceedings like this one create regulatory uncertainty, making it difficult for industry participants to run their businesses. However, the new rule embodied in the

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[21] *Notice* at para. 21.

Commission's tentative conclusion is unreasonable as a matter of both law and policy. The tentative conclusion as formulated in the *Notice*, and as surely will be argued for by the ILECs, would lead to complete deregulation not only of advanced services and basic Section 251 unbundling requirements as the *Notice* suggests, but also of basic services as long as those services are bundled with advanced services. The record in related proceedings demonstrates without question that any interpretation of the Act that would lead to this result – complete deregulation of the ILECs' services, or at the very least, the ability to bypass Title II regulations and the key market opening provisions imposed on the ILECs by Congress – could not be considered even remotely reasonable.

Nor are there any changed circumstances that could lead the Commission to reverse its holding of several years ago that wireline broadband Internet access is a "telecommunications service." As the record in the pending ILEC Broadband[23] proceeding shows, intermodal competition is insufficient to provide a check on ILEC dominance. That record shows that many competitive broadband providers that could have provided a check on ILEC dominance were forced to exit the market, or scale back their operations. The extensive record in that proceeding shows insufficient competition exists to check dominance and that ILECs already are abusing market power with respect to broadband. Any Commission interpretation of the rules that would achieve the same end result – deregulation of core Title II services – cannot be considered a reasonable interpretation of Congress's command that the

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22 *See Report to Congress*, 13 FCC Rcd at 11530, para. 60, *citing Frame Relay Order*, 10 FCC Rcd 13717, 13722-23, paras. 40-46 (1995).

23 *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, FCC 01-360 (rel. Dec. 20, 2001 ("*ILEC Broadband*" proceeding).

Commission regulate dominant carriers, and its requirement that ILECs provide UNEs to their competitors until Sections 251 and 252 of the Act are fully implemented.

C. The DC Circuit Upheld the FCC's Prior Ruling that Transmission Used To Provide xDSL Is A Telecommunications Service

The *Notice's* tentative conclusion that wireline broadband Internet access is an "information service" contradicts recent Commission rulings interpreting the Act and is highly unwise from a policy standpoint. Moreover, such conclusion would unlikely withstand appellate scrutiny if adopted by the Commission. The Commission's prior conclusion that wireline broadband Internet access is a Title II "telecommunications service" already has been upheld by the United States Court of Appeals for the District of Columbia Circuit.

In the *Advanced Services MO&O and NPRM*, the Commission held advanced services were telecommunications services.[24] However, in response to an appeal filed by Qwest, the Commission sought voluntary remand to address certain issues Qwest raised. It then issued the *Advanced Services Order on Remand*, which Qwest ultimately appealed. In *WorldCom v. FCC*, the D.C. Circuit vacated holdings the Commission made in the *Advanced Services MO&O and NPRM* and *Advanced Services Order on Remand* that xDSL was either local exchange or exchange access service. However, the court denied Qwest's petition to vacate the entire order.[25] Instead, the D.C. Circuit upheld the portion of the order that held the Commission could apply section 251(c) duties to local exchange carriers, including the portions of the orders containing the quotes set forth above.

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24 *Advanced Services MO&O and NPRM*, 13 FCC Rcd at 24029-30, para. 35.

25 *WorldCom v. FCC*, 246 F.3d at 693.

D. The Issue Reserved by the FCC in the *Report to Congress* Was Far Narrower That Than Framed Here; The Commission Must Not Now Conflate Two Issues to Approve a Conclusion It Has Already Rejected

The issue here, regulatory treatment of xDSL under the Act, already has been answered. ILECs are subject to 251(c)(3) obligations with respect to these services, as outlined in *WorldCom v. FCC*. In the *Report to Congress*, the Commission was seeking to answer the question of whether self-provisioned Internet access providers, a very small subset of providers, should be required to contribute to Universal Service.[26] The Commission tiptoed around this issue in the *Report to Congress* because of the firestorm of criticism that would arise if it did anything to increase the cost of Internet access. The *Notice* threatens to confuse the two issues, suggesting that existing carriers already subject to unbundling obligations could evade them by bundling their telecommunications services with information services, through as simple an artifice as providing their customers with the ability to have their own home pages.[27] Similarly, the *Notice's* suggestion, that the information service component of the ISP service is inextricably intertwined and inseparable from the telecommunications service component, thereby leading to a finding that the service is an information service, was rejected by subsequent Commission orders. That the Commission's *Report to Congress* and numerous orders implementing Section 251 of the Act somehow articulated a policy judgment that would enable ILECs to evade regulation under Title II of the Act is pure fantasy, as the following analysis of the *Report to Congress* makes clear.

Issued in 1998, the *Report to Congress* addressed the issue of whether common carriage obligations should be imposed on Internet Service Providers ("ISPs"), and more specifically, what were the universal service contribution obligations of ISPs. The *Report to*

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[26] *Report to Congress*, 13 FCC Rcd at 11528, para. 55.

Congress's answer was that ISPs that purchase transmission from others, *i.e.*, from carriers, do not need to contribute to the universal service fund. The Commission held that those carriers pay into the fund indirectly, because the carriers from whom they purchase service pay into the fund taking into account the revenues they receive from those ISPs.[28] As to the small subset of ISPs that self-provision their own raw transmission capacity, the Commission held those carriers also do not have to contribute to universal service, but left open the possibility that those ISPs may be required to contribute in the future.[29]

In a nutshell, the *Report to Congress* held that ISPs, unlike ILECs, are not subject to common carriage obligations.[30] However, unlike the *Notice*, the *Report to Congress* never suggested that an ILEC can evade its common carrier obligations merely by claiming it is an ISP. Quite the contrary, the *Report to Congress* viewed ISPs and carriers as mutually exclusive:

> Internet service providers and other information services providers also use telecommunications networks to reach their subscribers, but they are in a very different business from carriers. Internet service providers provide their customers with value-added functionality by means of computer processing and interaction with stored data. They leverage telecommunications connectivity to provide these services, but this makes them customers of telecommunications carriers rather than their competitors.[31]

However, merely because an ILEC provides some ISP service, or provides raw transmission capacity to itself does not render it a non-ILEC, nor entitle it to avoid the obligations that Congress saw fit to impose on ILECs.

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27 *Notice* at para. 21.

28 *Report to Congress*, 13 FCC Rcd at 11528, para. 55.

29 *Id.*

30 *Id.* at 11552, para. 105.

31 *Id.*

ILECs, by virtue of their status as ILECs, have certain obligations under Sections 251 and 252 of the Act. Congress imposed these obligations because ILECs control bottleneck facilities – facilities paid for over the years by monopoly ratepayers – that other carriers need in order to provide competition. Congress's judgment was that the Commission may not forebear from imposing these requirements until Section 251 is fully implemented. In fact, Section 251 is far from fully implemented, and any action the Commission takes to lessen unbundling obligations will only forestall the day when full implementation of the Act occurs. The Commission must interpret the Act in light of the legislation's pro-competitive purpose. The Commission cannot interpret the Act in a way that renders Sections 251 and 252 as mere surplusage. The *Notice's* notion that ILECs ought to be entitled to the same regulatory treatment as self-provisioning ISPs is simply wrong. Those ISPs, unlike the ILECs, do not control bottleneck facilities. ILECs, because they do control bottleneck facilities, remain subject to sections 251 and 252. If the Commission wrongly interprets the Act in a way that enables ILECs to evade these obligations, competition and consumer welfare will suffer.

The Commission must make clear the narrow issue it is dealing with in this proceeding: whether ISPs that self-provision the raw transmission capacity used to provide Internet access should be required to contribute to Universal Service based on their use of such facilities.[32] The Commission cannot use this narrow inquiry as an excuse to allow ILECs to evade Section 251 as well as basic common carriage obligations, as the *Notice* threatens to do. In fact the *Advanced Services MO&O and NPRM* and *Advanced Services Remand Order* were both issued *after* the *Report to Congress*. Both orders held that the telecommunications

[32] *See Report to Congress*, 13 FCC Rcd at 11528, para. 55. Also left open was the issue of the proper treatment of phone-to-phone IP telephony. However, the Commission did not seek comment on that issue in the *Notice*.

component of Internet access had to be dealt with separately from its information service component. Those orders also made clear that ILEC providers of xDSL remained subject to the requirements of section 251(c). The Commission should reaffirm those conclusions here, as no valid reasons exist to reverse them. The only issue remaining in this proceeding therefore should be whether Internet access providers that self-provision the telecommunications services used to provide their ISP service must directly contribute to the Universal Service fund.

IV. THE *COMPUTER INQUIRIES* SAFEGUARDS MUST BE PRESERVED AND STRENGTHENED

A. Background.

Because of the Bell Operating Companies ("BOCs") monopoly control of wireline facilities, the Commission has long sought to maintain appropriate safeguards for the provision by the BOCs of enhanced services. In 1966, the FCC initiated what has become known as the *Computer Inquiries* to confront the growing interdependence of the regulated communication common carrier services and the unregulated data processing services.[33] The *First Computer Inquiry* focused on the separation of common carrier transmission services from those data processing services which depend on common carrier services in the transmission of information.[34] At the time, regulated carriers did not participate to a great extent in data processing. Finding that data processing services were being offered on a highly competitive

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33 *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities*, Notice of Inquiry, 7 FCC 2d 11, 14, at para. 13 (1966) ("*Notice of Inquiry*").

34 *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities* ("*Computer I*" or "*First Computer Inquiry*"), 28 FCC 2d 291, 297-98 (1970) ("*Computer I Tentative Decision*"), 28 FCC 2d 267 (1971) ("*Computer I Final Decision*"), *aff'd in part sub nom. GTE Service Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973); *decision on remand*, 40 FCC 2d 293 (1983).

basis,[35] the Commission declined to subject those services to regulations primarily intended to restrain market power. In reaching its decision, the Commission stated:

> In view of all of the foregoing evidence of an effective competitive situation, we see no need to assert regulatory authority over data processing services whether or not such services employ communications facilities in order to link the terminals of the subscribers to centralized computers. We believe the market for these services will continue to burgeon and flourish best in the existing competitive environment.
>
> We expect the competitive environment within which data processing services are now being offered to result in substantial public interest benefit by making available to the public, at reasonable charges, a wider range of existing and new data processing services. We believe that these expectations will continue to be realized in the free give-and-take of the marketplace without the need for and possible burden of rules, regulations and licensing requirements.[36]

Although the *First Computer Inquiry* did not address provision of data processing by AT&T and the Bell System since it was thought that these companies were prohibited from providing such service under constraints imposed by the 1956 Consent Decree[37] then in effect, the Commission did declare that regulated carriers might provide data processing services on a structurally separated basis. The Commission recognized then that "the data processing industry has become a major force in the American economy, and that its importance to the economy will increase in both absolute and relative terms in the years ahead."[38] Consequently, the

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35 *Computer I Tentative Decision*, 28 FCC 2d at 297-98.

36 *See Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities*, Tentative Decision, 28 FCC 2d 291, 298 (1970); Final Decision and Order, 28 FCC 2d 267 (1971) *aff'd in part sub nom. GTE Service Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973); *decision on remand*, 40 FCC 2d 293 (1983).

37 *United States v. Western Electric Co.*, 1956 Trade Cases 71134 (D.N.J. 1956).

38 *Computer I Final Decision*, 28 FCC 2d at 268-69, para. 7.

Commission correctly understood that separation was critical to ensure competition and facilitate growth in the data processing industry.[39]

Thus, two important principles emerged from *Computer I*. First, because they were operating in highly competitive markets, data processing services would not be subject to common carrier regulation under Title II of the Communications Act. Second, the FCC sought to ensure that the data processing services market would be protected from anti-competitive behavior by those with monopoly control over transport facilities and thus subject to common carrier regulation.

In the early 1980s, the Commission issued its *Computer II* orders,[40] which largely affirmed and built upon the *First Computer Inquiry*. In the *Second Computer Inquiry*, the Commission conducted an extensive reexamination of the most appropriate regulatory framework for the provision of services that combined data processing and communications by carriers and others in light of continuing technological change and the difficulty of drawing an

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[39] It is interesting to note that as far back as the mid-1960s, when the *Computer Inquiries* began, carriers were making the same hollow claims they make today:

> From the common carriers' standpoint, regulation should extend to all entities offering like services or to none. It is urged that the ability to compete successfully depends on the flexibility required to meet the competition, and that the carriers would be deprived of this flexibility if they alone were restricted in their pricing practices and marketing efforts by the rigidities of a tariff schedule.

Notice of Inquiry, 7 FCC 2d at 15, para. 18.

> The explosive growth and innovation in both the communications and data processing industries since then has shown that the carriers' claims to be grossly unfounded.

[40] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384 (1980) ("*Computer II Final Decision*"), *modified on recon*., 84 FCC 2d 50 (1981) ("*Computer II Reconsideration Order*"), *further modified on recon.*, 88 FCC 2d 512 (1981) ("*Further Reconsideration Order*"), *aff'd sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert denied*, 461 U.S. 938 (1983), *aff'd on second further recon.*, Memorandum Opinion and Order, 56 Rad Reg. 2d (P&F) 301 (1984).

"enduring line of demarcation" between common carrier and data processing services.[41] The Commission redrew the distinctions between communications and data processing and adopted a new regulatory definitional scheme with two service categories: "basic," which was defined as "the common carrier offering of transmission capacity for the movement of information,"[42] and "enhanced," which was defined as "any offering over the telecommunications network which is more than a basic services,"[43] and which included data processing services. Enhanced services are now referred to as "information services" in the 1996 Act.[44]

Once again the Commission concluded that it should continue to regulate basic services under Title II, but declined to regulate enhanced services.[45] Recognizing that it would be undesirable to subject these new services to tariffing and other requirements that accompanied traditional common carrier regulation, the Commission concluded:

> In our judgment, regulation of enhanced communications services would limit the kinds of services an unregulated vendor could offer, restricting this fast-moving, competitive market. Regulation would disserve the interest of consumers and the goals of the Communications Act.[46]

Computer II also established a new regulatory framework to govern the participation of AT&T and the Bell companies in the enhanced service marketplace. The Commission was concerned that carriers providing both basic telecommunications services and enhanced services

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41 *Computer II Final Decision*, 77 FCC 2d at 430, para. 120.

42 *Id.* at 419, para. 93.

43 *Id.* at 420, para. 97.

44 The Commission has concluded that Congress sought to maintain the basic/enhanced distinction in its definition of "telecommunications services" and "information services," and that "enhanced services" and "information services" should be interpreted to extend to the same functions. *See Report to Congress*, 13 FCC Rcd 11501, 11516-17 (para. 33), 11520 (para. 39), 11524 (paras. 45-46) (1998).

45 *Computer II Final Decision*, 77 FCC 2d at 430, para. 119.

46 *Id.* at 434, para. 129.

could discriminate against competitive enhanced service providers that sought to purchase underlying transmission capacity from the carrier. One of the primary potential abuses that concerned the Commission was "denial of access to the 'bottleneck,' *i.e.*, local exchange and toll transmission facilities."[47] The Commission focused thus very closely on the control of local facilities and the ability of a carrier to use its monopoly control over local facilities to engage in anti-competitive activities in the provision of enhanced services. As the Commission explained:

> The importance of the control of local facilities, as well as their location and number, cannot be overstates [sic]. As we evolve into more of an information society, the access/bottleneck nature of the telephone local loop will take on greater significance. Although technological trends suggest that hard-wire access provided by a telephone company will not be the only alternative, its existing ubiquity and the amount of underlying investment suggest that whatever changes do occur will be implemented gradually.[48]. . . An essential thrust of this proceeding has been to provide a mechanism whereby non-discriminatory access can be had to basic transmission service by all enhanced service providers. Because enhanced services are dependent upon the common carrier offering of basic services, a basic service is the building block upon which enhanced services are offered.[49]

Consequently, in declaring that enhanced services would not be regulated, the Commission created one major caveat: AT&T and its BOC descendents, when seeking to offer advanced services, were subject to a set of rules designed to ensure that they did not leverage their monopoly power.[50] Specifically, *Computer II* imposed structural separation requirements on the then-integrated Bell System, which maintained the policy that these companies could only provide enhanced services through separate subsidiaries. It also required the subsidiary to

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47 *Id.* at 461-75, paras. 201-32.

48 *Id.* at 468, para. 219.

49 *Id.* at 476, para. 234.

50 *Id.* at 461-75, paras. 201-232.

acquire its transmission capacity from the parent company pursuant to tariff.[51] The Commission explained that this meant that the same transmission facilities or capacity provided to the subsidiary by the parent must be made available to all enhanced service providers under the same terms and conditions.[52] Following the divestiture of AT&T in 1984,[53] the Commission extended the structural separation requirements of *Computer II* to the BOCs.[54] The genius of *Computer II* was that it ensured that the essential telephone network would remain an open platform permitting the enhanced services market to innovate and thrive. That approach has been remarkably successful in spurring innovation and competition in the enhanced-services marketplace.

In the *Third Computer Inquiry*[55] the Commission reaffirmed the basic/enhanced services dichotomy. The Commission reexamined the state of the telecommunications marketplace and

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51 *Id.* at 466-74, paras. 215-230.

52 *Id.* at 474, para. 229.

53 *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

54 *Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Equipment by the Bell Operating Companies*, Report and Order, 95 FCC 2d 1117, 1120 (¶ 3) (1984) ("*BOC Separation Order*"), *aff'd sub nom. Illinois Bell Telephone Co. v. FCC*, 740 F.2d 465 (7th Cir. 1984), *aff'd on recon.*, 49 Fed. Reg. 26056 (1984) ("*BOC Separation Reconsideration Order*"), *aff'd sub nom. North American Telecomm. Ass'n v. FCC*, 772 F.2d 1282 (7th Cir. 1985).

55 *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, Report and Order, 104 FCC 2d 958 (1986) ("*Phase I Order*"), *recon.*, 2 FCC Rcd 3035 (1987) ("*Phase I Reconsideration Order*"), *further recon.*, 3 FCC Rcd 1135 (1988) ("*Phase I Further Reconsideration Order*"), *second further recon.*, 4 FCC Rcd 5927 (1989) ("*Phase I Second Further Reconsideration*"), *Phase I Order and Phase I Reconsideration Order vacated sub nom. California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) ("*California I*"); Phase II, 2 FCC Rcd 3072 (1987) ("*Phase II Order*"), *recon.*, 3 FCC Rcd 1150 (1988) ("*Phase II Reconsideration Order*"), *further recon.*, 4 FCC Rcd 5927 (1989) ("*Phase II Further Reconsideration Order*"), *Phase II Order vacated, California I*, 905 F.2d 1217 ; *Computer III Remand Proceedings*, 5 FCC Rcd 7719 (1990) ("*ONA Remand Order*"), *recon.*, 7 FCC Rcd 909 (1992), *pets for review denied, California v. FCC*, 4 F.3d 1505 (9th Cir 1993) ("*California II*"); *Computer III Remand Proceedings*: *Bell Operating Safeguards and Tier 1 Local Exchange Company Safeguards*, 6 FCC Rcd 7571 (1991) ("*BOC Safeguards Order*"), *recon. dismissed in part*, Order, 11 FCC Rcd 12513 (1996); *BOC Safeguards Order vacated in part and*

the effects of structural separation since *Computer II*. Recognizing the inefficiencies associated with structural separation, the Commission adopted rules that allowed BOCs the option of moving from full structural separation to a system of non-structural safeguards, which it found would prevent anti-competitive activities.[56] Non-structural safeguards under *Computer III* include Comparably Efficient Interconnection ("CEI"), Open Network Architecture ("ONA"), and certain installation and maintenance reporting requirements.[57] Thus, currently there are two regimes that a BOC can follow in order to enter the ISP market: *Computer II* structural separation or *Computer III* non-structural safeguards. Both of these regimes are designed to ensure a level playing field and to ensure that non-affiliated ISPs are in the same position to acquire telecommunications services as BOC-affiliated ISPs.

The *Computer Inquiries* resulted in the creation of an open platform in the telephone market where end users were able to select the ISP of their choice, which enabled the ISP market to thrive and grow into the highly competitive ISP market it is today. It also meant that the content and application markets layered on top of ISPs have been insulated from BOCs and were able to thrive unencumbered by anti-competitive practices. The concerns that caused the Commission to require safeguards for the provision of enhanced services by the BOCs remain valid today.

From the outset of the *Computer Inquiries*, the Commission has operated under the basic premise that deregulation is both desirable and necessary to foster competition in the telecommunications marketplace and to promote the introduction and innovation of enhanced

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remanded, California v. FCC, 39 F.3d 919 (9th Cir. 1994) ("*California III*"), cert. denied, 115 S.Ct 1427 (1995); *Computer III Further Remand*, 13 FCC Rcd 6040, Report and Order, 14 FCC Rcd 4289, *recon.*, 14 FCC Rcd 21628 (1999) (referred to collectively as the *Computer III* proceeding).

[56] *See Computer III Phase I Order*, 104 FCC 2d at 1011-13, paras. 98-100.

services. At the same time, the Commission has always accounted for the BOCs' monopoly control over the transport facilities that are used to provide these services, which continues today. This stands in stark contrast to assertions in the *Notice* that the *Computer Inquiry* decisions were initiated at a time when very different market circumstances existed.[58]

While the *Notice* has been quick to apply a general economic theory of competition and deregulation in the market for broadband services, it ignores that at the local level BOCs continue to have monopoly control over the underlying wireline transport facilities that must be used to provide broadband services. As a result, the *Notice* shows a marked reluctance to comprehend the remarkable success that has occurred under the regulatory framework that was carefully developed pursuant to the *Computer Inquiries*. Moreover, the *Notice* fails to grapple with the serious consequences of its misguided theory in the real world and to insure that the interest of the consumer will be served by the implementation of that theory. This is all the more disturbing when it is recognized that the industry that will be affected has been the most dynamic and efficient sector of the U.S. economy.

B. At a Minimum, Existing Safeguards Must Be Preserved.

Because a significant number of competitive broadband service providers rely on the monopoly controlled transmission facilities supplied by the BOCs, elimination of competitive safeguards will discourage innovation and distort the marketplace for broadband services. At a minimum, current Commission requirements that RBOCs separately tariff and provide to others on a non-discriminatory basis any telecommunications services it provides to itself to provide information services must be preserved. There simply is no justification for allowing self-

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57 *See id.* at 1035-1042, paras. 147-66.

58 *Notice* at para. 35.

provisioning wireline broadband providers to sell the underlying transmission capacity at market rates, as insufficient competition exists to prevent abuse of market power.[59] Because the underlying transmission facilities are under monopoly control by the RBOCs, any move toward "market-based" rates will actually result in monopoly rents to the RBOCs. Increasing the costs that independent ISPs and other providers must pay to purchase transmission services to provide their own broadband services will have a disastrous effect on broadband competition and innovation, and most importantly, on consumers.

V. TITLE I REGULATION OF INFORMATION SERVICES IS NOT WARRANTED BECAUSE INSUFFICIENT COMPETITION EXISTS TO PROTECT CONSUMERS FROM EXERCISE OF ILEC MARKET POWER

As recognized in the *Notice*, the FCC originally deregulated information services because competition existed for those services. Even if the statute supported a finding that xDSL-based advanced services are enhanced services with no telecommunications services component – a conclusion which the FCC already has rejected – a declaration that broadband Internet access has no telecom services component, and the resulting removal of core telecom services from regulation such as unbundling requirements, would not be warranted under the logic of the *Computer Inquiries* because *insufficient competition exists to protect consumers from ILEC market power over these services.*

Moreover, even if the law did not mandate Title II treatment of wireline broadband Internet access services, the Commission would have ample discretion to impose it, and it should do so here. Because of the lack of competition, and the necessity for CLECs to obtain network elements necessary to provide advanced services, the Commission should declare wireline broadband service to be a Title II service here. As the Commission has held many

[59] *Notice* at para. 50.

times, it has "always maintained the authority to classify facilities as common carrier facilities subject to Title II of the Communications Act if the public interest requires that the facilities be offered to the public indifferently."[60] Treatment of the bottleneck facilities needed to provide broadband falls into this category.

Common carrier regulation of entities that control monopoly inputs is not a discretionary policy judgment to be casually disregarded. Rather, this principle has been the law since 1934. Congress and the Supreme Court re-affirmed it in the 1990s. For the Commission to turn its back on these core principles that underlie its mission would be bad law and bad policy, and would disserve the public interest.

VI. STATES SHOULD NOT BE PREEMPTED FROM REGULATING ADVANCED SERVICES

The Commission also seeks comment in the *Notice* as to the proper role of the states in a regime where broadband Internet access is considered an "information service," and whether the Commission can and should preempt state regulation that is inconsistent with its proposed regime.[61] As stated above, allowing the ILECs to use regulatory arbitrage to self-deregulate by becoming Internet access providers is both bad law and bad policy, and will expose consumers and carrier-customers to unfettered exercise of ILEC market power. Preventing the states from addressing these issues will only magnify the harmful effects of such a policy. Preemption will also guarantee additional litigation, especially in California and Florida, which have already found they possess the power to regulate these issues, thereby increasing regulatory uncertainty.[62] The states have always served as laboratories where new

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60 *See, e.g., Cable & Wireless*, 12 FCC Rcd at 8531.

61 *Notice* at para. 63.

62 In a decision dated March 28, 2002, the California Public Utilities Commission held that the California PUC had concurrent jurisdiction with the FCC over DSL transport service.

ideas could be evaluated and, if successful, duplicated at the federal level. This Commission should not foreclose the states' opportunities to serve as vital testing grounds.

VII. FCC CANNOT USE THIS PROCEEDING AS AN "END RUN" AROUND THE LEGISLATURE TO ENACT TAUZIN-DINGELL

Many of the issues on which the Commission seeks comment in the *Notice* mirror proposed legislative findings contained in The Internet Freedom and Broadband Deployment Act, H.R. 1542 (the "Tauzin-Dingell Bill"). For example, even though the Commission found that the pace of broadband deployment was adequate in its recent 706 Report, Section 2, "Findings and Purpose" of the Tauzin-Dingell Bill, states that:

> The imposition of regulations by the Federal Communications Commission and the states has impeded the rapid delivery of high speed Internet access service to the public, thereby reducing consumer choice and welfare.[63]
>
> . . . the Federal Communications Commission has construed the [Telecommunications Act of 1996] . . . in a manner that has impeded the development of advanced telecommunications services . . .[64]
>
> It is the purpose of this Act to provide market incentives for the rapid delivery of advanced telecommunications services by deregulating high speed data services . . .[65]

See California ISP Association, Inc. v. Pacific Bell Telephone Co., Case No. 01-07-027 (filed July 26, 2001); In its pro-competition decision dated April 23, 2002, the Florida Public Service Commission determined that BellSouth must cease using its DSL service to block a competitor's access to the end user's voice service, by requiring that Bell South continue to provide DSL service to end users who switch their voice service to the UNE loop-based competitor. *See Petition by Florida Digital Network, Inc. for arbitration of certain terms and conditions of proposed interconnection and resale agreement with BellSouth Telecommunications, Inc.*, Florida Public Service Commission, Docket No. 010098-TP.

63 107th Cong. 1st Sess. H.R. 1542, at Section 2.

64 *Id.*

65 *Id.*

> . . . neither the Commission, nor any State, shall have authority to regulate the rates, charges, terms, or conditions for, or entry into the provision of, any high speed data services or Internet access service, or to regulate the facilities used in the provision of either such service.[66]

Thus, the Tauzin-Dingell Bill seeks to remove the Commission's ability to regulate advanced services. Similarly, in the *Notice*, the Commission seeks comment on whether a conclusion that Internet access does not contain a "telecommunications service" component would be to remove core ILEC services from the strictures of regulation under Title II of the Act and, in particular, the unbundling requirements of section 251 – virtually the same goal as the Tauzin-Dingell Bill.[67]

The Joint Commenters are concerned that the deregulation proposed by the Commission seeks to accomplish the objectives of the Tauzin-Dingell Bill, while circumventing the legislative process. This proceeding, along with the pending *Triennial Review* proceeding and the Commission's recently-begun *ILEC Broadband* proceeding appear to be a tripartite attempt to achieve the goals of Tauzin-Dingell through regulatory means.

Expressly designed to overturn existing Commission broadband policies that allow competitors access to interconnection and UNEs used to provide broadband, the Tauzin-Dingell Bill appears unlikely to become law this year due to strong opposition in the United States Senate. The Joint Commenters caution the Commission that it should not seek to accomplish through regulation what could, as a matter of law, only be accomplished through legislation, and which is antithetical to the Commission's history of pro-competitive policies.

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66 *Id.* at section 232.

67 *Notice* at para. 61.

In the *Notice*, the Commission claims that "the widespread deployment of broadband infrastructure has become the central communications policy objective of the day."[68] In its zeal to promote broadband deployment, the Commission must not overlook that the Act also requires the Commission "to encourage development of advanced telecommunications capability to all Americans . . . by utilizing . . . measures that promote competition in the local telecommunications market."[69] The Joint Commenters currently are fulfilling the Act's goals by deploying broadband. In paragraph 61 of the *Notice*, the Commission asks whether declaring that there exists no "telecommunications service" component in broadband Internet access could lead to ILECs being exempted from providing UNEs.[70] This is the same end-result that the Tauzin-Dingell Bill seeks. Such a result clearly departs from the Act's command that the Commission use measures to accelerate broadband deployment that promote competition, because a decision that could result in curtailing unbundling requirements helps no one but the ILECs.

The Commission imposed regulation on the ILECs because it found them to have market power over loops and other inputs to broadband that could be used to disadvantage their competitors. The technology used by ILECs to provide broadband is xDSL, which can be deployed over existing copper wires. All that is needed to deploy such technologies are installation of DSLAMs, the purchase of DSL modems (which is often charged through to end-user customers), and, for non-ILECs, access to unbundled loops. The Joint Commenters are currently deploying xDSL and other broadband technologies with far fewer financial resources than the ILECs, which earn billions of dollars in quarterly revenue. That the ILECs, which do

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68 *Notice* at para. 1.

69 47 U.S.C. note 157.

70 *See Notice* at para. 61.

not need to obtain interconnection or loops in order to provide these services, would need "help" from regulators prior to financing these network improvements simply defies common sense.

The issues concerning whether ILECs should continue to be subject to the Act are currently being debated in the United States Senate. Congress is the proper forum for this debate. That fact that the Tauzin-Dingell Bill's proponents believe an act of Congress is necessary to obtain this end result is a tacit admission that such an outcome is beyond the Commission's power to achieve. The Commission should leave the consideration of Tauzin-Dingell Bill as a matter for Congress to decide, and instead should concern itself with implementing the Act that Congress already has charged it to enforce.

As the Commission often has recognized, regulatory uncertainty imposes costs on companies. It is time for the Commission to remove the regulatory uncertainty it is imposing on CLECs by its continued efforts to enact Tauzin-Dingell by regulatory means. Removing regulation from ILECs and placing into question the continued enforcement of core obligations of the 1996 Act, as contemplated by the *Notice*, would place roadblocks in the way of competition, in contravention of the will of Congress.

VIII. THE COMMISSION SHOULD RESIST THE ILECS' PLEAS TO ENGAGE IN DEFINITIONAL GERRYMANDERING; IF THE COMMISSION TRULY SEEKS DEREGULATION, IT SHOULD BEGIN BY ENFORCING EXISTING RULES UNDER TO THE 1996 ACT SO THAT COMPETITION CAN TAKE HOLD

A. The Regulatory Uncertainty Created By This and Other Proceedings Is Harmful to Competition

Deregulation without competition is a zero sum game. Though undoubtedly viewed as surplus regulation by the ILECs, the Act and the Commission's rules implementing it are what make competition possible. Any "relief" that the Commission grants the ILECs

through this and related proceedings comes at the expense of competitors. Premature removal of regulations designed to promote fair competition, as the Commission has proposed in this *Notice*, imposes additional regulatory costs onto competitors. Competitors must participate in multiple proceedings just to preserve the hard won status quo. If they are unsuccessful in preserving the regulations that make competition possible, competitors face additional costs in order to obtain needed inputs to provide their service, or in some cases, would be unable to provide service at all. In this period of disappearing capital funding opportunities, competitors face many obstacles even under the current regulatory regime. These obstacles are formidable, and will only increase in magnitude should the Commission unwisely remove the regulatory safeguards that it so recently implemented to serve Congress's will. Proceedings such as this one merely heap onto competitors the additional burden of "regulatory uncertainty," in addition to the other formidable barriers they must face in operating their businesses. This burden more than offsets any alleged harms the ILECs purportedly suffer from the Commission's regulation, which was imposed upon them pursuant to Congress's command.

B. Because The ILECs' Still Control the Bottleneck Facilities Needed to Provide Broadband, The Commission Must Continue to Enforce Its Existing Rules in order to Protect Consumers and Other Carriers From the ILECs' Market Power

The *Notice* seeks comment on what safeguards are required to protect the interests of consumers in what the *Notice* claims is no longer a "one-wire world for customer access."[71] However, the record in the ILEC Broadband proceeding demonstrates that the premise that intermodal competition is today providing protection for consumers is demonstrably false. As documented in the comments of KMC, NuVox, and others in that proceeding, very little intermodal competition exists, and even where it does, it provides no meaningful check on ILEC

pricing behavior.[72] To the extent intermodal competition exists at all, it did not prevent the RBOCs from raising xDSL prices.[73] And SBC's own expert stated categorically that cable provides no meaningful competition in the business market.[74] The market shares of satellite broadband and terrestrial and mobile wireless services are barely a blip on the radar screen. Rather, the record in the pending *ILEC Broadband* proceeding demonstrates that the only competitive providers proven to spur broadband deployment and lower prices by ILECs are wireline competitors such as the Joint Commenters. Yet, the Commission actions contemplated in this proceeding, the *Triennial Review*, and the *ILEC Broadband* proceeding all would make it difficult, if not impossible, for wireline competitors to obtain the inputs that they need to provide competition that would protect consumers.

Facilities-based CLECs like KMC and NuVox today are providing broadband competition. They are serving markets untouched by intermodal competition and underserved by the ILECs. Yet, carriers such as KMC and NuVox face obstacles in obtaining UNEs to provide xDSL even under the current regime. For instance, KMC is experiencing difficulties today obtaining UNEs in Georgia from BellSouth, even with the added scrutiny of a pending 271 proceeding.[75] Any action that the Commission takes that jeopardizes the ability of CLECs to

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71 *Notice* at para. 60.

72 In the *ILEC Broadband* proceeding, KMC, NuVox, Cbeyond and others noted that intermodal competition from satellite, cable, and terrestrial wireless providers is nearly nonexistent in the small to medium sized business markets where they provide service, and that even SBC's own expert conceded that intermodal competition from cable was not a factor in these markets. Reply comments of KMC, NuVox, and Cbeyond, filed April 22, 2002 in CC Docket 01-337, at 7.

73 *See id.* at 4, 7.

74 *Id.* at 7.

75 *See Ex Parte* Letter from Tricia Breckenridge, Executive Vice President, Industry Affairs, KMC Telecom, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, May 2, 2002, CC Docket 02-35 at 2-3.

obtain UNE loops threatens to undermine the competition that these carriers bring to the table, thereby harming competition and consumer welfare.

If the Commission is truly interested in deregulation, it should enforce and strengthen existing regulations that promote competition. Only competition can allow deregulation. Removal of regulations – or in this case, changing regulatory classifications in a way that effectively removes regulation – before competition can take hold merely allows unfettered exercise of monopoly power, and that is anathema to the Commission's primary reason for existence. Deregulation for its own sake is merely a form of industrial policy where one set of competitors – in this case the ILECs – are favored over others. The only way for the Commission to achieve deregulation is by enforcing and strengthening existing rules so that competition can flourish. But the day when competition adequately protects consumers from ILEC dominance is far away, and will recede even further into the future should the Commission adopt the tentative conclusions proposed in the *Notice*.

IX. CONCLUSION

For the reasons discussed above, KMC and NuVox strongly urge the Commission *not* to adopt its tentative conclusion that wireline broadband Internet access services are information services subject to regulation under Title I of the Act. The Commission should instead reaffirm its prior conclusions that advanced services, such as xDSL-based access to the Internet, are telecommunications services subject to regulation under Title II of the Act.

Respectfully submitted,

By: _____/s/_____
Jonathan E. Canis
David A. Konuch
Randall W. Sifers
KELLEY DRYE & WARREN, LLP
1200 19th Street, N.W.
Suite 500
Washington, D.C. 20036
(202) 955-9600